STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
v	No. 259862 Wayne Circuit Court
SPENCER IVORY JOHNSON, Defendant-Appellant.	LC No. 04-007616-01

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, one count of car jacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, receiving and concealing a stolen motor vehicle, MCL 750.535(7), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of 130 months to 20 years for each of his armed robbery and car jacking convictions, and one to five years for his felon in possession of a firearm, receiving and concealing stolen property, and carrying a concealed weapon convictions. He was sentenced to two years for his felony-firearm conviction, which runs consecutive to his other sentences. He appeals as of right. We affirm.

I. Underlying Facts

The instant case arises out of the carjacking of a motor vehicle in the early morning hours of July 12, 2004. Aaron Hamilton picked up Schalecsha Moore for a date in a burgundy colored Pontiac with a "Prestige" auto dealership sticker affixed to the bumper. When they left Francel's Lounge at 1:15 a.m., they walked toward Hamilton's car, which was parked across the street from the bar. As Hamilton approached the car, he turned around to notice a man dressed in dark clothing with his arm around Moore and a gun pointed to her side. Hamilton described the man as a light-skinned black man wearing dark clothes, but could not see his face. The man pointed the gun at Hamilton's head, ordered him to the ground, and demanded his money. Hamilton described the gun as a "handgun," with "a black barrel on it" and a light-colored handle. He testified that the gun admitted at trial looked like the gun used in the robbery. The man grabbed Hamilton's wallet from his pocket. The wallet contained his identification and $80 in cash.

Hamilton believed the man also ordered Moore to the ground and took her purse, which contained the keys to Hamilton's car. The man then ordered them to run to a nearby alley. As

they were running toward the alley, they heard a gunshot from the direction of the Pontiac and ducked behind a parked car. Hamilton heard his car "squeal out a little bit" as it was driven away. Hamilton and Moore returned to the bar approximately "two or three minutes" later. The police were called and arrived a few minutes later. Responding officer Ryan Conner recalled Hamilton reporting that Hamilton's burgundy Pontiac, which had a "Prestige Auto" sticker on the bumper, was stolen that night. He remembered Hamilton describing the gunman as a "black male, approximately 5'11", 190 pounds, light complexion with a medium build who was armed with a gun," clean shaven, and wearing a black tee-shirt and black jeans. Moore's witness statement, which was admitted by stipulation, substantially confirmed Hamilton's version of events. However, Moore described the man as 5'8" to 5'9", medium complexion, with a "low fade" and possibly no facial hair. She claimed he wore a black jersey and black pants.

Cornell Jackson testified that while he was stopped at the stoplight, he witnessed a car that looked "like purple Intrepid or something," traveling approximately 90 miles an hour through the intersection. The car swerved off the road, crashed into a junkyard, and flipped over. Jackson drove to where the car had flipped over and waited for police. When Police Officer Christopher Harwood arrived at the accident approximately five miles from the bar, he saw a maroon Pontiac flipped upside-down; the fire department and emergency medical personnel were already at the scene attempting to free defendant from the car. He noticed a gun lying on the ground immediately outside the vehicle and a purse in the car. About five minutes after Officer Conner broadcasted a description of the gunman and Hamilton's car over the police radio, he was informed of a nearby accident involving a similar vehicle. This was approximately twenty minutes after Officer Conner had arrived at the bar.

Conner went to the accident scene, determined that defendant matched the description of the gunman, and had defendant arrested and conveyed to the hospital as a police prisoner. A photograph of defendant taken at the hospital showed defendant with a beard and mustache. Officer Conner testified that defendant was wearing blue jeans and not black jeans, but he nevertheless believed defendant's jeans were "dark" colored. He also found Moore's purse and a gun matching the description given by Hamilton in the vehicle. Hamilton could not identify defendant in a lineup, but identified his car at the tow yard. The car was "totaled" and there was a bullet hole in the driver's side door.

Defendant's recollection of the events was remarkably different. Defendant is 5'7" and weighs 149 pounds. On July 12, 2004, he lived with his grandmother approximately one-half mile from where the accident occurred. He had ridden the bus to his aunt's house at about 8:00 p.m., on July 11, 2004, had been drinking Bacardi 151 since 6:00 p.m., and had passed out on his aunt's couch. When he awoke around 12:40 a.m., he started to walk home, which took him in the direction of a gas station about halfway between his aunt's house and his grandmother's house. At the gas station, he saw a mechanic he knew as "Rob," who was bent over, standing outside the open driver's door of a car, apparently looking for something inside. When defendant asked Rob for a ride home, Rob refused but let defendant borrow the car. Despite being drunk, defendant agreed. Defendant believed he passed out while driving and did not remember the crash. He did not look to see what was inside the car, but was instead focused on getting home.

On October 8, 2004, the jury informed the court it had reached a verdict on four of the seven counts, but was at an impasse regarding the remaining three counts. The attorneys agreed

that jury instruction CJI2d 3.12, regarding a dead-locked jury, was appropriate. The following week, however, defendant's attorney objected to the trial court hearing a partial verdict on the four counts and then requiring the jury to return to the jury room to try and break the deadlock on the remaining three counts. The trial court accepted the jury's partial verdict of guilty of felon in possession of a firearm, receiving and concealing a stolen motor vehicle, carrying a concealed weapon, and felony-firearm. The jury subsequently found defendant guilty of two counts of armed robbery and one count of carjacking. Defendant was sentenced accordingly.

II. Double Jeopardy

Defendant argues that his convictions of both stealing and possessing the same stolen motor vehicle constitute a violation of the double jeopardy protection against multiple punishments for the same offense. Specifically, he claims that because it is legally impossible for him to be both the thief who stole the motor vehicle and the person who received the stolen motor vehicle, the carjacking verdict, returned after the guilty verdict of receiving and concealing a stolen motor vehicle, must be vacated. We disagree. Defendant failed to preserve this issue by raising a double jeopardy objection either to the filed charges or the given jury instructions. *People v Matuszak*, 263 Mich App 42, 47-51; 687 NW2d 342 (2004). Therefore, we review for plain error affecting substantial rights. *Id.* at 47.

The protection against multiple punishments for the same offense restrains the prosecutor and the courts, not the Legislature. *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003), citing *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). If there is a clear indication the Legislature intended to impose multiple punishment for the same offense, there is no double jeopardy violation. *Id.* The statute pertaining to receiving, possessing, or concealing a stolen motor vehicle, MCL 750.535(7), specifically provides that "[t]his subsection does not prohibit the person from being charged, convicted, or punished under any other applicable law." Moreover, the plain language of MCL 750.535(7) provides that "[a] person shall not . . . *possess* . . . a stolen motor vehicle knowing that the motor vehicle is stolen, embezzled or converted." (emphasis added). Hence, defendant's contention that it is legally impossible to commit both offenses is without merit according to the plain language of the statutes. Because the Legislature clearly intended multiple punishment for possessing a stolen motor vehicle and the underlying felony of carjacking, there is no double jeopardy violation. See *Shipley, supra* at 378.

III. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his convictions. When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Although defendant argues that the evidence is contradictory and thus insufficient to support his multiple convictions, he does not set forth the elements of his offenses, and does not explain which elements are lacking evidentiary support. This issue is therefore abandoned on appeal because an appellant may not merely announce a position and leave it to the appellate court to ascertain and rationalize the basis for the claim, nor may he give an issue cursory treatment with little

citation of supporting authority. *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005) (citation omitted).

IV. Defendant's Motion for a Mistrial

Defendant argues the trial court abused its discretion by denying his motion for a mistrial after learning of discussions between the jury members in violation of court order, and improper contact between one of the alternate jurors and a complaining witness. We disagree.

A trial court has discretion whether to grant or deny a mistrial, and unless prejudice is shown, reversal is not required. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). An abuse of discretion occurs "when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling." *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004), citing *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Prejudice is shown when the trial court's ruling is so grossly in error that it deprives the defendant of a fair trial or amounts to a miscarriage of justice. *Wells, supra.* "A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992), citing *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

Here, defendant's attorney informed the trial court that one of the alternate jurors spoke to a complaining witness for approximately forty-five minutes while the jury was deliberating, and then gave one of the deliberating jurors a ride home. Defendant's attorney accepted the opportunity to question the alternate juror about the substance of her conversation with the sitting juror and to present that evidence to the court the following week. The following week, defendant's attorney stated there was no evidence of inappropriate conversations between the alternate juror and any deliberating jurors. Defendant, therefore, cannot show prejudice.

Also, the court clerk observed some jurors talking about the case outside the restroom. Defendant's attorney moved for a mistrial on this ground, which was denied. Although some jurors might have been discussing the case outside of deliberations, defendant fails to show how he was prejudiced as a result of this conversation. The trial court, therefore, did not abuse its discretion by denying defendant's motions for a mistrial. Cf. *People v Fetterley*, 229 Mich App 511, 544-546; 583 NW2d 199 (1998).

V. Evidence of Prior Convictions

Defendant argues that the trial court abused its discretion by admitting evidence of defendant's May 3, 2001 conviction of receiving and concealing a stolen motor vehicle. We disagree. This Court reviews a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Ullah, supra* at 673.

Under MRE 609, a conviction containing an element of dishonesty or false statement is automatically admissible. *People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997),

citing *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988). However, if the conviction merely contains an element of theft, the court must determine whether the offense "was punishable by more than one year in prison, and, if the witness is a criminal defendant, whether the probative value of the evidence outweighs its prejudicial effect." *Parcha, supra* at 241-242, citing *Allen, supra* at 605-606. Clearly, receiving or concealing stolen property is a theft-related offense. *People v Griffis*, 218 Mich App 95, 101-102; 553 NW2d 642 (1996). Further, receiving or concealing a stolen motor vehicle is punishable by more than one year in prison. MCL 750.535(7).

When analyzing probative value, the court may only consider (1) the age of the conviction, and (2) the degree to which the conviction indicates truthfulness; in determining prejudicial effect, the court may only consider (1) the similarity between the conviction and charged offense, and (2) whether admission of the offense causes the defendant not to testify. MRE 609(b). Defendant's prior conviction was three years old at the time of trial; because it was relatively recent, it had more probative value. See *People v Meshell*, 265 Mich App 616, 636; 696 NW2d 754 (2005). Receiving or concealing stolen property is moderately indicative of veracity and, thus, moderately probative. *People v Clark*, 172 Mich App 407, 419; 432 NW2d 726 (1988). Because the admission of the evidence did not prevent defendant from testifying on his own behalf, there are no potential effects on the decisional process to consider. However, given that the prior conviction involved the same statutory violation for which he was charged in the instant case, the potential for prejudice was significant. See *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991). Generally, a court's decision on a close evidentiary issue is not considered an abuse of discretion. *Meshell, supra* at 637.

With these principles in mind, the trial court allowed the evidence, ruling that the former offense was sufficiently close in time and that it would issue a cautionary instruction to the jury regarding proper use of that information in reaching its verdict. Defendant testified on direct examination that he was previously convicted of possessing a stolen car. The prosecutor did not comment about the conviction during trial. Therefore, the conviction was not given undue emphasis. The trial court took care to limit the prejudicial effect of the prior conviction when it instructed the jury that defendant's past conviction could be considered in "deciding whether you believe the defendant is a truthful witness" and not for any other purpose. The court specifically instructed that "a past conviction is not evidence that the defendant committed the alleged crime in this case," and jurors are presumed to follow their instructions. *Meshell, supra* at 637. Thus, on this record, the trial court did not abuse its discretion in admitting the evidence.

Even if the challenged prior conviction were inadmissible under MRE 609(b), reversal would not be warranted. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative). "The erroneous admission of evidence of a prior conviction is harmless error where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed." *Coleman, supra* at 7; see also *Lukity, supra*. Given the amount of evidence against defendant, the admission of the prior conviction did not affect the outcome of defendant's case.

VI. Hearsay / Right to Confrontation

Defendant argues that defendant's Sixth Amendment right to confront the witnesses against him was violated when the trial court allowed statements by an absent witness, Moore, to be admitted as evidence at trial. We review a trial court's general determination of the admissibility of evidence for an abuse of discretion; however, the determination whether evidence is admissible under a rule of evidence is a matter of law subject to de novo review. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). Generally, to be considered timely, an objection should be interjected between the question and the answer. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

To the extent defendant's argument pertains to the written statement Moore gave to police or statements by Moore elicited by defense counsel, it is well established that a defendant may not "harbor error as an appellate parachute." *Fetterley, supra* at 520. Defendant cannot stipulate to an action and then claim error on appeal. A party may not seek appellate relief for an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). However, to the extent defendant's argument pertains to Moore's statements to Hamilton about the $800 missing from her purse, this argument is not waived.

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, the United States Supreme Court articulated a bright-line rule that, to admit testimonial evidence against a defendant, the Confrontation Clause requires the unavailability of a witness and a previous opportunity for cross-examination. *Id.* at 68. See also *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). Although the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" it noted that "[w]hatever else the term covers, it applies at a minimum . . . to police interrogations." *Crawford, supra* at 68.

In this case, Investigator Duff testified that Moore informed him about the missing $800 when her purse was returned to her. Officer Conner testified that Moore showed up to the accident scene to ask if her purse had been recovered. She claimed there was $800 in the purse when it was taken. Conner said Moore had not mentioned the $800 when he spoke to her in the bar's parking lot. Hamilton testified that Moore told him she had $800 in her purse; he found this "peculiar" because she told him earlier that she did not have any money, and he stated he did not believe she had $800 in her purse.

The prosecutor does not dispute that Moore's statements to the Officers were testimonial evidence; because Moore did not testify, she was unavailable for cross-examination. Moreover, there is no evidence that defendant was afforded the opportunity to cross-examine Moore before trial. Assuming arguendo that it was error to admit Moore's statements regarding the missing money, we nonetheless affirm the convictions because the error was harmless beyond a reasonable doubt. In *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), a case addressing an assumed violation of the Confrontation Clause, our Supreme Court stated that any "alleged error was not a structural defect requiring automatic reversal." Rather, the question was whether the alleged constitutional error was harmless beyond a reasonable doubt. *Id.* The Court ruled:

> Harmless error analysis applies to claims concerning Confrontation Clause errors[.] But to safeguard the jury trial guarantee, a reviewing court must "conduct a thorough examination of the record" in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. [*Id*. at 348 (citations omitted).]

As previously noted, the evidence against defendant was overwhelming. The testimony with respect to the $800 was unnecessary to prove defendant's guilt. In addition, it was contradicted by witnesses for the prosecution, and defendant used the evidence to further his theory that Moore was lying. Hence, it is clear the jury would have reached the same verdict absent the evidence. *Shepherd, supra* at 347.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens